IN THE

Supreme Court of the United States

TERM, 1945

No. 355

ERNEST E. SCARBOROUGH,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

A CORPORATION,

Respondent.

PETITION FOR RE-HEARING FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS (3RD) BY ERNEST E. SCARBOROUGH

JOHN HENDERSON HOFFMAN,
I. LOUIS RUBIN,
B. NATHANIEL RICHTER,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

HISTORY OF THE CASE

This case was before the United States Supreme Court on October 15, 1945, on Petition for Writ of Certiorari. The petition was denied. Mr. Justice Black, Mr. Justice Murphy, and Mr. Justice Douglas were of the opinion that the certiorari should be granted. The motion of the Congress of Industrial Organizations for leave to file a brief, amicus curiae, was granted.

BRIEF

This case was before the Court on petition by Ernest E. Scarborough for certiorari. On October 15, 1945, the following opinion was rendered, denying certiorari:

> "The petition for writ of certiorari in this case is denied. Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy are of the opinion that the petition for certiorari should be granted because of conflict with *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54. The motion of the Congress of Industrial Organizations for leave to file a brief amicus curiae is granted."

To the petitioner herein, the refusal of certiorari means the denial of a day in court before a jury of his peers, assured to him by the Constitution of the United States. The petitioner believes that under the Federal Employers Liability Act, 45 U.S.C.A. 51, et seq., as interpreted by the case of *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, he has established facts sufficient to create a jury issue.

To the petitioner the refusal of certiorari comes as a blunt and staggering blow. When this petition was filed it was done only after careful study of what this Court said in *both* the majority and dissenting opinions in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350. Convinced that the action of the Court below was in direct conflict with *Tiller* v. *Atlantic Coast Line Railroad Co.*, supra, its brief was not filed solely because of the utter conviction that the case was wrongly decided. Having applied the extraordinarily severe formula laid down by Mr. Justice Roberts in his dissent in *Bailey* v. *Central Vermont R. Co.*, supra, on when certiorari should be granted, this case measured up fully to even those tests.

Mr. Justice Roberts there said:

> ". . . While the legal principles binding alike on court and jury in such actions are, for the most part, settled, the complexes of fact to which these principles are applica-

ble rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the *legal effect* of the proofs adduced by plaintiff or defendant, we independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history . . .

". . . And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. *And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed.*" (Italics supplied.)

The instant case is not one where the legal effect of the proofs was misappraised. The decision below did not recognize the controlling legal principles at all. It cannot, with any logic, be argued that they were merely improperly applied.

The only judicial comment uttered in the case shows a total lack of understanding of the *Tiller* case, supra, the effect of the removal of assumption of risk as a defense, and its review of the multiple guises in which it had repeatedly previously appeared in the decisions. It cannot be contended, by any stretch of the imagination, that in what had been judicially said below, was there any recognition of the "controlling legal principles." *A fortiori,* then, if we use the test for granting certiorari laid down by the majority of the Court in the *Bailey* case, supra, certiorari should here have been granted.[1]

The Federal Employers Liability Act, 45 U.S.C.A. 51 et seq. does not distinguish between operating and non-operating employees. The sole requirement any injured railroad employee need meet to come within the purview of this act is to

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[1] On deprivation of the right to trial by jury by misapplication of the controlling legal principles.

establish the interstate character of his work in the light of the amendment of August 11, 1939 c. 685, Sec. 1, 53 Stat. 1404.

Now this decision in this case has set apart *in practical effect* non-operating employees from operating employees. The intrinsic nature of the work done by non-operating employees, the characteristic pattern of the accidents which befall them,[2] the difficulties of proof because negligence here generally results from acts of omission rather than commission, all necessarily will be a part of every other suit for damages brought by a non-operating employee.

This decision places before these employees an extra obstacle not contemplated by Congress which intended to help alike *all* railroad employees engaged in interstate commerce.

With certiorari here denied, to whom now shall this vast army of employees turn for correction of this problem? Certainly not to Congress,[3] as Congress has already done all it could conceivably have done within the framework of an act that undoubtedly has features highly superior to ordinary workmen's compensation law.

By this decision, it is respectfully submitted, remedial legislation has been subverted by judicial action. Only by granting a writ of certiorari and proper application of the law, as enunciated in the *Tiller* case, supra, to the facts in this case can the non-operating employee also be given the protection intended by Congress. The refusal of certiorari here as surely deprives these employees of that protection as the adoption of the view of the learned dissenting judge in the *Tiller* case would have deprived all interstate railroad employees thereof. The comments of the learned trial judge and the per curiam affirmance by the learned Judges of the Circuit Court of Appeals[4] are at one with the reasoning of the dissenting opinion in the *Tiller* case. Refusal of certiorari here as effectively adopts that rea-

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[2] Previously described in original brief.

[3] To whom courts generally refer litigants for remedial legislation.

[4] The presiding judge was also a member of the Court that twice ruled on the *Tiller* case.

soning[5] as could have been achieved by direct reversal of the *Tiller* decision.

This we regretfully conclude with full recognition of the principle that refusal of certiorari does not always mean approval of the opinion below.

CONCLUSION

1. By proper application of the principles enunciated in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, the case should have been submitted to the jury. The action of the court below was in direct conflict with the cited case.

2. Certiorari should be granted when the court below fails to apply properly the controlling legal principles involved; especially is this true when, as in the instant case, the Court below failed to recognize the problem at all. Conflict ensues between the action of this Court on the previous petition for certiorari and what all nine justices recognized as a proper basis for allowing certiorari in *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, and *Deputy* v. *Dupont*, 308 U. S. 488, 499, even as to its dissenting opinion.

3. The effect of refusal of certiorari here transcends what will happen to the immediate injured employee. It directly affects every non-operating railroad employee. The avenue of succor, intentionally widened to its utmost by Congress to benefit all interstate employees, has now been narrowed by judicial ruling to benefit only operating employees. Congress could not have spoken more plainly to the contrary. It is respectfully submitted that the law of this case as it now stands is without legislative sanction and beyond correction by new legislation.

Respectfully submitted,

JOHN HENDERSON HOFFMAN,
I. LOUIS RUBIN,
B. NATHANIEL RICHTER,
Counsel for Petitioner.

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[5] Since the controlling principles of the majority opinion in the *Tiller* case are expressly challenged.